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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1019

NORMAN R. HELD, Petitioner,
v.
UNITED STATES OF AMERICA, Respondent.

On Petition for a Writ of Certiorori to the
United States Court of Appeals
for the Third Circuit

REPLY BRIEF TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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I.

THE GOVERNMENT KNEW, OR SHOULD HAVE KNOWN THAT THE PAPE GRAND JURY TESTIMONY COMES WITHIN THE PURVIEW OF BRADY V. MARYLAND.

The government, in its Brief in Opposition, continues to act as the judge, jury and final arbiter as to what material must be produced under the rule as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963). The mere fact that "the government is satisfied that the [Pape Grand Jury] transcript was not producible under *Brady*", is not sufficient to overcome the dictate in *Brady* that "evidence [which] is material either to guilt or to punish-

ment irrespective of the good faith or bad faith of the prosecution" must be revealed to the defense upon request. (United States Brief in Opposition, p. 20; see Heid Pet. 1019, p. 13).

The government fails to answer Petitoner's argument that the lower court's decision with regard to the Pape Grand Jury testimony is in conflict with the decisions of four other Circuit Courts. (Heid Pet. 1019, p. 21) Why has the government omitted answering Petitioner's argument that the resulting conflict of decisions among the Circuit Courts presents a substantial question to be resolved by this Court when, in Part III of its Brief the government attempts to answer the arguments of American Standard as to the conflict of decisions among various Circuit Courts concerning the application of 28 U.S.C. 1732 (a), and the argument of Kohler Company concerning the conflict of decisions with respect to the responsibility of a corporation for the alleged unlawful acts of its corporate officials? (Brief in Opposition, pp. 21-24)

II.

THE PROSECUTOR'S CROSS-EXAMINATION OF PETITIONER WITH REGARD TO THE KOHLER STRIKE WAS DELIBERATELY PLANNED, AND DID PREJUDICE THE MINDS OF THE JURY SO AS TO PREVENT AN INDIVIDUAL DETERMINATION BY THE JURY OF THE PETITIONER'S GUILT OR INNOCENCE.

The government pictures the lengthy, extensive and unfair cross-examination of the Petitioner with regard to the Kohler strike as "a brief interlude" and as "a brief episode" in a lengthy trial, which was a "harmless cross-examination." (Brief in Opposition, pp. 25-26). It is respectfully submitted that this presents a problem calling for a critical review of the record by this Court as was done in *Berger v. United States,* 295 U.S. 78 (1935), so that this Court can determine for itself whether, in fact, Petitioner and his counsel had invited this type of cross-examination and whether, in fact, it did so prejudice the jury so as to prevent the Petitioner from receiving a fair trial.

III.

THE GOVERNMENT'S STATEMENT OF THE FACTS DOES NOT FAIRLY REPRESENT THE EVIDENCE, BOTH FAVORABLE AND UNFAVORABLE, IN AN EFFORT TO BRING THIS CASE WITHIN THE RATIONALE OF THE "HARMLESS ERROR" RULE OF *UNITED STATES v. SOCONY-VACUUM OIL CO.*

The government, in its Brief in Opposition to the Petitions before this Court has so stated its rendition of the facts so as to claim more for the evidence introduced at the trial than actually was produced. This same tactic was used in the Court of Appeals to achieve an affirmance in that Court.

However, despite the fact that the Court of Appeals accepted as true the facts as proffered by the government, the lower court admittedly "found and identified errors", and the government is apparently in accord with this finding. It is submitted that the government has mistated the facts and evidence adduced at the trial in order to minimize these trial errors and thereby come within the purview of the "harmless error" rule as enunciated in *United States v. Socony - Vacuum Oil Co.*, 310 U.S. 150, 239-240 (1940). The government would have this Court believe that its "proof rested not primarily on inferences. . . . but on direct testimony of witnesses . . .". It is respectfully submitted that a thorough reading of the record in this case would reveal to this Court that the government's "evidence" of the conspiracy, is in fact based upon inference upon inference, with little, if any, empirical evidence. This is especially true as to Petitioner Norman Held, since a review of the evidence produced at the trial reveals that there were no

statements of any of the witnesses that he knowingly agreed to participate or tacitly consented to go along with the alleged conspiracy.

This case presents a problem that frequently occurs in conspiracy trials, i. e., the failure to give each defendant an individual determination of his guilt or innocence. The taking of excerpts from a 10,000 page transcript and applying them against all defendants can give the appearance of "overwhelming" evidence. However, when read with a view toward the application of the testimony as to each individual defendant, the government's "evidence" tying the Petitioner into the alleged conspiracy dissipates and becomes nothing but a shell which cannot withstand a critical analysis. In determining as to whether or not the evidence is "overwhelming" so as to label the errors found during this trial as harmless it is unfair to exclude the substantial evidence favorable to the Petitioner as well as to overlook the lack of evidence unfavorable against the Petitioner.

As this Court has stated in *Socony* "each case necessarily turns on its own facts" to determine whether or not trial errors are so prejudicial as to "poison the minds of jurors even in a strong case . . ." *United States v. Socony Vacuum Oil Co., supra.*

Respectfully Submitted,

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